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IN THE

Supreme Court of the United States

October Term, 1965

No. 889

STEPHAN RIESS and THELMA McKINNEY RIESS,
Petitioners,

vs.

C. W. MURCHISON, JOHN MURCHISON, GERALD C. MANN, RUSSELL ALLEN, MARTHA COLON, MURMANILL CORPORATION, a Texas corporation, DIVERSA, INC. a Delaware corporation, KADOTA DEVELOPMENT COMPANY, INC., a Delaware corporation, DIXIE PIPE LINE COMPANY, a Delaware corporation, changed to SIMI VALLEY DEVELOPMENT COMPANY, a corporation, DIVERSA-CAL PROPERTIES, INC., a Nevada corporation, DIVERSA-CAL DEVELOPMENT COMPANY, a Nevada corporation, PACIFIC WESTERN PROPERTIES, INC,, a Nevada corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

POLLOCK & DEUTZ,
By MAX FRANK DEUTZ,
612 South Flower Street,
Suite 812,
Los Angeles, Calif. 90017,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above entitled cause on July 7, 1965 affirming without opinion a judgment of dismissal in the District Court.

Citations to Opinions Below.

A copy of the judgment of the Court of Appeals for the Ninth Circuit is set forth as Appendix G hereto.

The various orders of the District Court, which are the subject of this Petition are referred to in the text

herein and are set forth in Appendices A, B, C, D, E and F.

Jurisdiction.

The judgment of the Court of Appeals, dated July 7, 1965, is appended hereto as Appendix G. A Petition for Rehearing was timely filed and denied on October 14, 1965 (Appendix H). Said order of denial provided that a Petition for Certiorari might be brought within 90 days of the date thereof. This Petition is filed within that 90-day period.

This Court has jurisdiction of this Petition pursuant to 28 U.S.C. Section 1254(1).

Questions Presented.

1. Whether the trial court abused its discretion in refusing to grant leave to amend the complaint, thereby unfairly denying the plaintiffs the opportunity to be heard.

2. Whether the Court of Appeals for the Ninth Circuit so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and of its inherent power to prevent a miscarriage of justice.

Statement of Facts.

This is a clear hardship case where the plaintiff, with valid multimillion dollar claims against multiple defendants, have been denied their day in court because of the ineptness of their counsel in failing to adequately plead jurisdiction in the federal courts.

The original complaint was based upon diversity of citizenship, 28 U.S.C.A. 1332. The plaintiffs are, and have been alleged to be, both citizens and residents of

the State of California. All of the corporate defendants were alleged to be citizens of other states. The original complaint, however, failed to state the locations of the principal places of business of the corporate defendants. It further failed to state the citizenship of the individual defendants, although it did state the place of their residence.

Certain defendants filed Motions to Dismiss based on (1) lack of jurisdiction over the persons of defendants, (2) lack of jurisdiction over the subject matter, and (3) failure to state a claim upon which relief can be granted. They also filed Motions for More Definite Statements. The multiple motions were heard and the District Court, by order dated May 20, 1963 (Appendix A), quashed service of process on the individual defendants, because of invalid attempts at service beyond the territorial limits of the Southern District of California, and continued the hearing on the other motions.

While the motions were pending, a number of declarations and affidavits were filed with the court on behalf of both the plaintiffs and the defendants. All of these affidavits are a part of the record on this Petition for Certiorari and will not be reviewed here in detail. The bulk of them, however, were statements and contradictions as to whether or not certain of the principal corporate defendants did business within the State of California so as to be subject to service of process within the Southern Judicial District of California.

The plaintiffs did supply one key allegation by way of affidavit, however, in that plaintiff Stephen Riess, by declaration filed April 11, 1963 [Tr. Rec. p. 75],

alleged that Diversa Inc., Murmanill Corporation and Simi Valley Development Company all had their principal places of business in Dallas, Texas. This is important in that these are the only three defendants the plaintiffs presently contemplate retaining in the litigation.

On October 10, 1963 the District Court entered a further order (Appendix B) (1) dismissing defendants Murmanill Corporation and Diversa, Inc. because of attempted service of process beyond the territorial limits of the district, (2) granting the Motions for More Definite Statements, and (3) denying the Motions to Dismiss of Simi Valley Development Company, Diversa-Cal Properties, Inc., Diversa-Cal Development Corporation, and Pacific Western Properties, Inc. without prejudice to renewal after more definite statements were furnished by the plaintiffs.

On October 29, 1963 an Amended Complaint was filed in lieu of responses to the Motions for More Definite Statements. This amended complaint alleged the diverse citizenship of all of the corporate defendants and stated that all of the corporations had been and still were transacting business in the State of California. It alleged that the individual defendants "were and now are bona fide residents of the State of Texas." The amended complaint *failed* to allege the principal place of business of the corporations and failed to allege the place of citizenship of the individual defendants.

On November 8, 1963 the District Court, on the basis of the amended complaint, ordered service of process on Murmanill Corporation and Diversa, Inc. by serving the Secretary of State of California pursuant

to California Corporations Code 6500-6508 (Appendix C).

On November 13, 1963 new motions were filed to dismiss the amended complaint on the same basic grounds alleged on the Motions to Dismiss the original complaint. There appears to be no question but that the amended complaint was still deficient in that the plaintiffs again failed to state the principal places of business of the corporate defendants and the citizenship of the individual defendants.

On argument of the motions on January 6, 1964 [Rep. Tr. p. 33] Attorney Hy Schwartz made the allegation on behalf of the plaintiffs that all of the corporate defendants other than Murmanill, Diversa, Inc. and Simi Valley Development Co. had their principal places of business in Reno, Nevada.

On September 30, 1964 the District Court filed its Memorandum and Order (Appendix D) reciting that the defendants had filed new Motions to Dismiss on the grounds that the amended complaint on its face affirmatively showed the lack of jurisdiction by failure to show the principal place of business of the defendant corporations, that counsel for the plaintiffs had twice had the opportunity to make the proper allegations and had failed to do so, that there was a failure to show diversity and a failure to show the citizenship of the individual defendants as to whom residence was alleged. The court stated that it considered dismissing the amended complaint with leave to amend, but as this was the second chance that plaintiffs' counsel had had to make the complaint conform to the requirements of diversity, the court concluded that he could not do so and thus felt justified in dismissing the ac-

tion as to all parties. The Judgment of Dismissal was entered on October 9, 1964. (Appendix E.)

On October 12, 1964 a Motion to Vacate Judgment and Order of Dismissal for Want of Jurisdiction and to Amend Complaint to Clarify the Jurisdictional Issue was filed. Again, affidavits were filed by the parties on both sides, most of which was largely a repetition of the matters previously stated except that the declaration of Stuart Kadison (dated October 22, 1964) [Tr. Rec. p. 303], on behalf of the defendants, stated that Kadota Development Company had its principal place of business in California and that Simi Valley Development Company, Diversa-Cal Properties, Inc., Diversa-Cal Development Company and Pacific Western Properties, Inc. had *a* principal place of business in California.

The same counsel for defendants, in another suit involving a different controversy between these parties in the District Court, Southern District of California (956-58 HW-*Riess v. Murchison* and 329 F. 2d 635, where the appellate court assumed diversity and raised no issue thereon), prepared Findings of Fact and Conclusions of Law (signed by the Court on June 15, 1962) which read as follows:

"II.

"Defendants and Third Party Defendants Simi Valley Investment Company (hereinafter referred to as 'Simi') is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in the City of Dallas, State of Texas."

On November 5, 1964 the District Court made its Order Denying Plaintiff's Motion to Vacate Judgment and Order of Dismissal for Want of Jurisdiction and

to Amend Complaint to Clarify the Jurisdictional Issue (Appendix F), holding that the allegations of the complaint did not meet the requirements for federal jurisdiction and further that the declarations filed by the plaintiffs were insufficient to remedy the jurisdictional deficiency.

The Gist of the Problem.

The problem in this case was the attempt by an attorney, completely unversed in federal procedure and pleading, to set up the necessary jurisdictional allegations to establish diversity of citizenship as to a number of related corporate defendants, many bearing confusingly similar names. There is no question but that both the complaint and the amended complaint lack the necessary allegations as to the principal places of business of the corporate defendants. Further, the complaints alleged the residence but not the citizenship of the individual defendants.

The long and involved affidavits and declarations and the extended colloquy between the attorney for the plaintiffs and the District Court at the hearings on the motions reveal quite clearly that the plaintiffs' attorney (1) thought that the jurisdictional allegations lacking in the complaint and amended complaint could be supplied by affidavit, (2) mistakenly thought that he had supplied by affidavit or declaration *all* of the missing allegations, and (3) completely lost sight of the fact that the pleadings plus the declarations and affidavits still did not allege complete diversity between the plaintiffs and certain of the lesser important corporate defendants.

It appears that counsel misconstrued 28 U.S.C. 1332 (c) by failing to recognize the duality of citizenship

of a corporation being both in the state of incorporation and in the state where it has its principal place of business.

At the time of the argument on appeal, counsel for the plaintiffs offered to dismiss all of the dispensable party defendants and file an amended complaint properly alleging jurisdiction only as to the three principal corporate defendants, Murmanill, Diversa, Inc. and Simi Valley Development Co. (App. Op. Br. p. 28.) As to these three defendants, the defendants have admitted in their affidavits that Murmanill and Diversa, Inc. are incorporated in, and have their principal places of business in, states other than California. As to Simi Valley Development Company, the defendants have merely alleged that it has *a* principal place of business in California. This equivocal answer was actually noted by the trial court in the course of his comments from the bench [Rep. Tr. p. 56] but the court apparently lost sight of this discrepancy in the colloquy that followed. It should further be noted that as to Murmanill Company, Diversa, Inc., and Simi Valley Development Company jurisdiction was conceded in the District Court in a diversity action between these plaintiffs and those corporations on another, and unrelated, cause of action. (See reference above.)

We believe that a reading of the colloquy between the court and counsel at the time of hearings makes it quite clear that counsel for the plaintiffs was confused and never fully gathered the import of the court's statements and admonitions from the bench. On the other hand, it is equally clear that the trial court knew that counsel for the plaintiffs was confused, but it also appears that because of the hodgepodge of con-

fused jurisdictional pleading, declarations, affidavits and oral statements, the court itself never grasped the fact that this whole case could be, and plaintiffs were willing that it should be, reduced to the three defendants as to whom there was diversity, Murmanill, Diversa, Inc. and Simi Valley Development Company and that jurisdiction as to them had been conceded by the defendants except for the equivocal statement as to *a* principal place of business in California for Simi Valley Development Company.

Lurking in the background of the case were affidavits and declarations involving the propriety of service of process. These involved statements and counterstatements as to the nature of the business activity of these corporate defendants, principally the three key ones referred to, within the State of California, so as to make them amenable to process within the judicial district. This feature of the case, however, raised factual issues, and the authorities seem to be quite clear that where factual issues are involved on matters of jurisdiction or service of process, the court should take testimony on those issues *and* should make and file findings of fact and conclusions of law as on a motion for summary judgment. This was never done in this case, and it appears that the arguments on doing business in California may well have been confused by the court with the allegations as to the principal place of business of these corporations being other than in California.

Furthermore, counsel for plaintiffs made known to the Court on the argument on the Motion to Vacate, etc. [Rep. Tr. p. 61] that the Statute of Limitations had expired and that it was too late to file an action in the California courts.

One aspect of this problem seems particularly pertinent on the question of abuse of discretion by the Court. At the time the Court dismissed the action, the amended complaint had been voluntarily filed by plaintiffs. The Court's ruling was therefore its only ruling on the over-all jurisdiction question, and the Court never permitted an amendment after its ruling. Therefore, plaintiffs, after the ruling settling the jurisdictional issues, have never had the opportunity to replead. The trial court apparently thought the plaintiffs could not do so. However, the record shows that all the requisites for jurisdiction had been revealed and we can only conclude that the Court became impatient with counsel for the plaintiffs.

Furthermore, as set forth in more detail below, the actual grounds stated were technical in nature in that the court stated that it was dismissing the action because the complaint did not show all the jurisdictional requisites for diversity *on its face.* It recognized that there were factual issues involved in the determination of jurisdiction but refused to pass on them or to defer ruling on the motion until a hearing on the merits as suggested in *Shahmoon Industries, Inc. v. Imperato,* 3rd Cir. 1964, 338 F. 2d 449; *Molnar v. National Broadcasting Company,* 9th Cir. 1956, 231 F. 2d 684, and *Chicago Stadium Corporation v. State of Indiana,* 7th Cir. 1955, 220 F. 2d 797, and further to make findings of fact thereon; *Mantin v. Broadcast Music, Inc.,* 9th Cir. 1957, 248 F. 2d 530.

The plaintiffs appealed to the Court of Appeals for the Ninth Circuit and the judgment was affirmed. The same counsel as in the District Court wrote the brief. A mere cursory reading of plaintiffs' briefs on appeal

clearly disclose the same confusion on counsel's part that existed in the court below. In fact, the briefs are such a hodgepodge of confusion that it is no wonder that the appellate court apparently gave up any attempt to sort out the issues and affirmed the day the matter was argued without opinion (Appendix G). Much of the discussion in the briefs dealt with defendants as to whom plaintiffs had asserted they would drop, or concerned the question of whether certain corporations did business in California, a matter dealing with ability to serve process and not germane to the issue of "*principal* place of business".

Present counsel petitioned for rehearing, but the nature of that petition did not permit argument and the petition was denied apparently on the basis of the original arguments on appeal which, as we have stated, were confused and unconvincing.

Now, the plaintiffs, through new counsel, are attempting to extricate themselves from the predicament that the errors of their original counsel have created. The elements for diversity jurisdiction *are* present. Plaintiffs have been denied the right to have their case heard on the merits, and they have no other remedy in state or federal courts. Where the dismissal is on the technical ground of failure to fully state jurisdiction in the complaint, but the record discloses facts to indicate that jurisdiction does in fact exist, we submit that the trial court abused its discretion in not permitting an amended pleading, or at least taking evidence on the jurisdictional issues and making appropriate findings thereon.

Pertinent Authority Supporting Petition.

1. Abuse of Discretion by Trial Court.

Petitioners feel that the doctrine laid down in the recent case of *Foman v. Davis* in this Court (1962), 371 U.S. 178, 181, 182, 83 S. Ct. 227, 228, 9 L. Ed. 2d 222 is applicable here.

At page 181, this Court stated:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 335 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1.
>
> "The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.
>
> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he

> ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Neither undue delay, bad faith nor dilatory motive appear here. The failure to properly allege jurisdiction was the failure of counsel to understand what was expected of him as a pleader of federal jurisdiction. The remarks of the court in discussing jurisdiction were less than helpful when it should have been readily apparent to the court that counsel did not comprehend the purport of the court's remarks. [Rep. Tr. particularly p. 55.] Under these circumstances, the action of the court was an abuse of discretion when the facts showing diversity were apparent, although outside the complaint, and it was also apparent that the innocent plaintiffs were being made to suffer by their counsel's mistake. With the statute of limitations having run, the plaintiffs were thus denied any hearing on the merits of their claim and thereby denied their day in court.

That the trial court took an arbitrary and highly technical position is illustrated by the statements on page 57 of the Reporter's Transcript:

> "The Court: But I am not passing on a question of fact as to where the principal place of business, if any, of these corporations are because I don't think this is the time nor the place to do that.
>
> Mr. Schwartz: I assume that your Honor's conclusion that the facts alleged in the affidavit of Mr. Riess and myself and others showing the principal place of business—
>
> The Court: Are insufficient.
>
> Mr. Schwartz: —are insufficient, and they cannot be given consideration.
>
> The Court: They are wholly insufficient. It must appear from the complaint."

By ruling that the complaint alone was to be considered, in all fairness the court should have permitted the representations made in declarations, affidavits and in argument to be incorporated in an amended complaint.

In similar cases where counsel's ineptness created an injustice to his clients, the courts have been willing to exercise their powers to do equity and justice to the aggrieved client. *Chicago Stadium Corporation v. State of Indiana,* 7th Cir. [1955], 220 F. 2d 797, at page 799, where the court said:

> "We think this is a case that should be tried on the merits. Although plaintiff's counsel bears the responsibility for the inept allegations of the complaint and the form and contents of the caption, nevertheless plaintiff should have its day in court."

See also *Breier v. Northern California Bowling Proprietors Ass'n,* 9th Cir. [1963], 316 F. 2d 787, 789. In this case leave to amend the complaint was denied where the court concluded that the complaints were "so inherently frail" that they were "not the subject of any amendment." The Court of Appeals reversed, stating at page 789:

> "Even if the question had been addressed to the Court's discretion, we think leave to amend should have been granted. The purpose of pleading under the Rules 'is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). To this end, Rule 15 'was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.' United States v. Hougham, 364 U.S. 310, 316, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960). 'If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason —such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."' Foman v. Davis, 317 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).
>
> "As the Supreme Court indicated in Foman, amendment should not be barred as futile if the

> underlying facts 'may be a proper subject of relief.' As we have recently said, leave to amend should be allowed unless the complaint 'cannot under any conceivable state of facts be amended to state a claim.' Alexander v. Pacific Maritime Ass'n, 9th Cir., 1963, 314 F.2d 690. Leave to amend should be granted 'if it appears at all possible that the plaintiff can correct the defect.' 3 Moore, Federal Practice, §15.10 at 838 (2d ed. 1948)."

In *Molnar v. National Broadcasting Company,* 9th Cir. [1956], 231 F. 2d 684, the complaint was defective in alleging diversity of citizenship. The court said that a complaint defective in such allegation could be amended to show the true state of facts even in the United States Supreme Court. In the lower court the plaintiff's attorney did not avail himself of any of the opportunities to correct the record and to make the necessary allegations. Instead he promptly appealed the ruling to one of the minor points of practice to the appellate court. The court said: "This bitter insistence upon shallow technicalities by a lawyer is not to be commended." Later on the court went on to say that this was a frivolous appeal by the very nature of it. However, the court concluded: "The imposition of frivolous appeals such as this one upon the already overloaded docket of this Court, with the consequent waste of time, is condemned. *In order that the client may not suffer because of the course of action taken by the lawyer, the order is modified* to permit the filing of an amended complaint against the National Broadcasting Company, Inc., alone, as defendant, if the other defendants joined, but not identified can be dispensed with." (Emphasis added).

This court has looked with disfavor on dismissals of complaints for want of jurisdiction because of mere technical defects. In *Bell v. Preferred Life Assurance Society, etc.* (1943), 320 U.S. 238, 64 S. Ct. 5, 88 L. Ed. 15, at page 242, this Court said:

> ". . . A complaint filed in a federal court should not be dismissed for want of jurisdiction because of a mere technical defect such as would make it subject to a special motion to clarify."

Appellate courts frequently authorize amendments of pleadings to correct failures to properly state jurisdiction. *Texaco-Cities Service Pipeline Company v. Aetna Casualty and Surety Company,* 8th Cir. (1960), 283 F. 2d 145; *National Farmers Union Property and Casualty Co. v. Fisher,* 8th Cir. (1960), 284 F. 2d 421; *Mantin v. Broadcast Music, Inc.,* 9th Cir. (1957), 248 F. 2d 530.

In the *Mantin* case, *supra,* the same trial judge that granted this Motion to Dismiss was reversed for doing much the same thing he did here—he dismissed a complaint for failure to state a claim upon which relief could be granted where matters outside the complaint were presented to and not excluded by the trial judge. The Court of Appeals held that under F.R.C.P. Rule 12(b) the trial court was required to treat the Motion to Dismiss as a Motion for Summary Judgment and make the necessary findings of fact and conclusions of law along with a ruling on such motion. In our case, too, the trial court expressly refused to pass on the factual issues as to jurisdiction after receiving affidavits and factual argument.

In *Midwestern Development, Inc. v. The City of Tulsa, Oklahoma,* 10th Cir. [1963], 319 F. 2d 53, page 54, the court said:

> ". . . In the case at bar the plaintiff specifically requested permission to amend to set forth additional allegations establishing federal jurisdiction. In spite of the provisions of Rule 15 (a), F.R. Civ.P., that leave to amend 'shall be freely given when justice so requires,' the court denied such leave. We suggest that on remand the court reconsider the application to amend and that if the application is denied the court state its reasons for such denial."

In *Harmon v. Superior Court,* C.A. 9 [1962], 307 F. 2d 796 at 797, the court stressed the point that a complaint may not be dismissed for lack of jurisdiction without plaintiff having a right to be heard "unless such lack appears on the face of the complaint and is *obviously not curable.*" (Emphasis added.)

In our case, the lack of jurisdiction appeared on the face of the complaint but was *not* "obviously not curable." As such, an opportunity to cure the complaint's defects should have been allowed.

2. Error by the Court of Appeals.

We have previously quoted from *Foman v. Davis* in this Court, *supra,* where this Court held that it was error for the Court of Appeals to affirm the denial of a motion to vacate a judgment of dismissal in order to allow amendment of a complaint.

Such error appears here by reason of the affirmance of an abuse of discretionary power on the part of the District Court.

The fact that the affirmance here, without opinion, is directly contrary to existing decisions of the Ninth Circuit in *Breier v. Northern California Bowling Proprietors Ass'n, Molnar v. National Broadcasting Company,* and *Mantin v. Broadcast Music Co.,* all cited above, leads us to believe that the record was so confused and the briefs so inadequate and full of irrelevant material that the Court of Appeals neither recognized, nor passed upon, the merits of this case as we have outlined them here.

For this the Court of Appeals can hardly be blamed, but nevertheless its sanction of error in the District Court brings it within the power of this Court to review and rectify a manifest injustice.

An examination of the Amended Complaint should be sufficient to show that, artfulness of pleading aside, there is a major legal controversy existing between the parties, and that the plaintiffs' claims, if provable, represent very large sums of money and a tremendous loss on their part.

The running of the Statute of Limitations forecloses the plaintiffs from relief in any other court.

Conclusions.

This case boils down to the simple situation where innocent plaintiffs, with meritorious and immensely valuable claims, have been denied their day in both federal and state courts. The denial of a trial on the merits, because of the mistakes in pleading by counsel, is not within the concept of fairness and justice that this Court has consistently followed. We respectfully submit that under the circumstances here the trial court

and the Court of Appeals erred in not permitting plaintiffs to correct their pleading by making the necessary jurisdictional allegations.

This Court has the power to adjust gross inequities in the courts below and, historically, has frequently done so. This is a case that warrants a simple remand to the District Court to permit the filing of an amended complaint properly alleging jurisdiction. We submit that in the spirit of equity and fairness, this Court should do so by granting a Writ of Certiorari.

Respectfully submitted,

POLLOCK & DEUTZ,
By MAX FRANK DEUTZ,
Attorneys for Petitioners.

APPENDIX A.

Order.

United States District Court, Southern District of California, Central Division.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, v. C. W. Murchison, et al., Defendants. No. 63-237-PH.

The motion of defendants C. W. MURCHISON, JOHN MURCHISON, GERALD C. MANN, RUSSELL ALLEN, MARTHA COLON, MURMANILL CORPORATION, a Texas corporation, and DIVERSA, INC., a Delaware corporation, to dismiss (1) for lack of jurisdiction over the person [Rule 12(b)(2) F.R.C.P.], (2) for lack of jurisdiction over the subject matter [Rule 12(b)(1) F.R.C.P.], and (3) for failure to state a claim upon which relief can be granted [Rule 12(b)(6) F.R.C.P.], and the motion of defendants SIMI VALLEY DEVELOPMENT COMPANY, DIVERSA-CAL PROPERTIES, INC., DIVERSA-CAL DEVELOPMENT CORPORATION, AND PACIFIC WESTERN PROPERTIES, INC. to dismiss (1) for lack of jurisdiction over the subject matter [Rule 12(b)(1) F.R.C.P.], (2) for failure to state a claim upon which relief can be granted [Rule 12(b)(6) F.R.C.P.], and for more definite statement [Rule 12(e) F.R.C.P.], having come on regularly for hearing before the undersigned judge of the United States District Court on May 13, 1963 at the hour of 10:00 a.m. of said day, the Court having read the records and files of the above entitled cause, the various notices of motion, the memoranda of points and authorities filed both in support and in opposition to the motions, together with

the declarations of Hy Schwartz, Stephan Riess, Frank G. Spain, Frederick R. Schumacher, and Stuart L. Kadison, and the Court being fully advised, and good cause appearing therefor, IT IS ORDERED AS FOLLOWS:

1. The service of summons and complaint upon defendants C. W. MURCHISON, JOHN MURCHISON, GERALD C. MANN, RUSSELL ALLEN, and MARTHA COLON should be, and the same is hereby, quashed;

2. The motions of MURMANILL CORPORATION, DIVERSA, INC., SIMI VALLEY DEVELOPMENT COMPANY, DIVERSA-CAL PROPERTIES, INC., DIVERSA-CAL DEVELOPMENT CORPORATION, and PACIFIC WESTERN PROPERTIES, INC. should be, and the same are hereby, continued to June 17, 1963 at the hour of 10:00 a.m. in Courtroom No. 1, United States Post-office and Courthouse Building, Los Angeles 12, California, there and then to be heard before the Honorable Pierson M. Hall.

The Clerk is directed to enter this order.

Dated: May 20, 1963.

/s/ Charles H. Carr
Charles H. Carr
United States District Judge

APPROVED AS TO FORM:
Hy Schwartz

APPENDIX B.

Order.

United States District Court, Southern District of California, Central Division.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, v. C. W. Murchison, et al., Defendants. No. 63-237-PH.

The motion of defendants, MURMANILL CORPORATION, a Texas corporation, and DIVERSA, INC., a Delaware corporation, to dismiss (1) for lack of jurisdiction over the person (Rule 12(b)(2) F.R.C.P.), (2) for lack of jurisdiction over the subject matter (Rule 12(b)(1) F.R.C.P.) and (3) for failure to state a claim upon which relief can be granted (Rule 12(b)(6) F.R.C.P.), and the motion of defendants SIMI VALLEY DEVELOPMENT COMPANY, DIVERSA-CAL PROPERTIES, INC., DIVERSA-CAL DEVELOPMENT CORPORATION, and PACIFIC WESTERN PROPERTIES, INC. to dismiss (1) for lack of jurisdiction over the subject matter (Rule 12(b)(1) F.R.C.P.), (2) for failure to state a claim upon which relief can be granted (Rule 12(b)(6) F.R.C.P.), and for a more definite statement (Rule 12(e) F.R.C.P.), having come regularly for hearing before the undersigned Judge of the United States District Court on August 12, 1963 at the hour of 10:00 a.m. of said day, Hy Schwartz, Esq. appearing on behalf of the plaintiffs and Stuart L. Kadison on behalf of the moving defendants, the Court having read the records and files of the above entitled cause, the various notices of motion, the memoranda of points and authorities filed both in support and in opposition to the

motions, together with the declarations of Hy Schwartz, Stephen Riess, Frank G. Spain, Frederick R. Schumacher, Stuart L. Kadison and James G. Scott, and the Court being fully advised, and good cause appearing therefor, IT IS ORDERED AS FOLLOWS:

1. It appearing that service of process on MURMANILL CORPORATION, a Texas corporation and DIVERSA, INC., a Delaware corporation, was made as to each corporation beyond the territorial limits of this Court's jurisdiction, the motion to dismiss as to each of these corporations is hereby granted;

2. The motion of defendants SIMI VALLEY DEVELOPMENT CO., DIVERSA-CAL PROPERTIES, INC., DIVERSAL-CAL DEVELOPMENT CORPORATION and PACIFIC WESTERN PROPERTIES, INC. for more definite statement is hereby granted and these defendants are entitled to an opportunity to such discovery as they desire.

3. The motions of defendants SIMI VALLEY DEVELOPMENT CO., DIVERSA-CAL PROPERTIES, INC., DIVERSA-CAL DEVELOPMENT CORPORATION and PACIFIC WESTERN PROPERTIES, INC. to dismiss for lack of jurisdiction over the subject matter, on the ground that they are not doing business in the State of California; and, for failure to state a claim upon which relief can be granted, on the grounds that the statute of limitations has run, are denied without prejudice to renewal of said motions after

a more definite statement is furnished by the plaintiffs, and after the defendants have conducted such discovery as they deem appropriate.

The Clerk is directed to enter this order.

Dated: October 10, 1963.

/s/ Peirson M. Hall
Peirson M. Hall
United States District Judge

APPROVED AS TO FORM:

Hy Schwartz

APPENDIX C.

Order.

United States District Court, Southern District of California, Central Division.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, vs. C. W. Murchison, et al., Defendants. No. 63-237-PH.

It appearing that the MURMANILL CORPORATION, a Texas corporation, and DIVERSA, INC., a Delaware corporation are both transacting business in the State of California.

That the principal place of business of both said corporations is in the Meadows Building, Dallas, Texas. That officers of said corporations upon whom serving of process can be made cannot be found in the State of California, and:

Good cause appearing therefore:

It is ordered that serving of process upon MURMANILL CORPORATION, Texas corporation and DIVERSA, INC., a Delaware corporation, be made by serving process upon the Secretary of State of the State of California, pursuant to the provisions of Sections 6500-6508, Corporations Code of the State of California.

Dated: November 8, 1963.

Peirson M. Hall
United States District Judge

APPROVED AS TO FORM:
Peirson M. Hall
Ely, Kadison & Quinn.

APPENDIX D.

Memorandum and Order.

United States District Court, Southern District of California, Central Division.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, v. C. W. Murchison, et al., Defendants. No. 63-237-PH.

On May 20, 1963, the service of summons on the individual defendants was quashed for lack of jurisdiction over the persons.

On October 10, 1963, defendants' Motion for more definite statement was granted. Instead of filing a more definite statement, plaintiffs filed an Amended Complaint against named individuals as defendants, but without any allegation as to their citizenship, as to whom process had been quashed, and naming numerous corporations theretofore designated as defendants. The Amended Complaint was filed on October 29, 1963.

On November 8, 1963, on Ex parte representations of plaintiffs' counsel, and without a detailed examination of the Amended Complaint, the Court made its order of that day, finding that Murmanill and Diversa, Inc. each had its principal place of business in Dallas, Texas, and that both were transacting business in California.

Defendants have now filed a Motion to dismiss on several grounds, one of which is that from the face of the Amended Complaint it affirmatively appears that the Court does not have jurisdiction over the persons or defendant corporations in that there is lacking any affirmative allegation as to the principal place of business [28 U.S.C. 1332(c)] of any of the corporation defendants, each of which is alleged to be incorporated in either Texas, Delware or Nevada.

The allegations concerning the State of incorporation may be sufficient to allege citizenship, but in order for the Court to determine whether or not it has jurisdiction under the Diversity Satute, there must also be an allegation in the Complaint as to where the corporation has its principal place of business. The latter allegation is entirely lacking as to each of the corporations named. This is significant in view of the fact that plaintiffs have twice had an opportunity to make such allegation in their Complaints, but have failed to do so.

As stated in *Brandt v. Bay City Super Market* (N.D. Calif. 1960) 182 F.Supp. 937 at 939-940:

> "To invoke the jurisdiction of this court, the complaint must distinctly set forth the citizenship of the defendants. [*Pasternack v. Dalo* (D.C.) 17 FRD 420; and see: *Cameron v. Hodges,* 127 U.S. 322, 8 S.Ct. 1154, 32 L.Ed. 132]. Under the existing law, this means that the complaint must set forth not only the state of incorporation of each corporate defendant, but also the state where such corporation has its principal place of business. [See: *Brown v. Hartford Fire Ins. Co.* (D.C.) 168 F. Supp. 796; *Washington-East Wash. Joint Authority v. Roberts & Schaefer Co.* (D.C.) 180 F. Supp. 15; and *Roseberry v. Fredell* (D.C.) 174 F. Supp. 937].
>
> "Plaintiff's complaint on file in this case does not set forth the required short and plain statement of the facts which show that this court has jurisdiction of this case. It is presumed that the court does not have jurisdiction. [Lehigh etc v. Kelly, supra; *U.S. v. Green,* supra; and *Durkey*

v. Arndt (D.C.) 46 F.Supp. 256]. It follows that the complaint must be dismissed. [See: *McNutt v. GMAC, supra; Walker v. Bank of America* (9 Cir.) 268 F. 2d 16; *Food Fair Stores v. Food Fair,* supra; *Becker v. Angle* (10 Cir.) 165 F.2d 140; *McClanahan v. Galloway* (D.C.) 127 F. Supp. 929; and *Sadler v. W.S. Dickey Clay Mfg. Co.* (D.C.) 78 F.Supp. 616]

There is thus lacking sufficient allegations for this Court to determine that there is the necessary diversity as to the corporations.

Plaintiffs in their amended Complaint make no effort to comply with Section 1332 of Title 28, U.S. Code, as to the individuals named. They merely allege that the individuals are "residents" of the State of Texas. The requisite for diversity is not residence, but citizenship.

In view of the fact that the action is required to be dismissed for the foregoing reasons, as to all parties, it is unnecessary to consider the other grounds urged by the defendants for dismissal of the action.

The Court has taken into consideration the matter of dismissing the Complaint and allowing plaintiffs to again amend. But, as heretofore pointed out, this is the second chance that counsel for plaintiffs, an experienced and able lawyer, has had to make his complaint conform to the requirements for diversity, and he has failed to do so. Under these circumstances, the Court can only conclude that he cannot do so, and feels justified in dismissing the action. See: *Gunther v. San Diego & Arizona Eastern Ry Co.* (9 Cir. Sept.4, 1964) No. 18,724.

In view of the foregoing,

IT IS HEREBY ORDERED that the Order of this Court of November 8, 1963, heretofore mentioned, be, and the same is, hereby vacated. Upon presentation of a judgment to that effect, the Court will order the action dismissed as to all defendants.

Dated: Los Angeles, California, this 30 day of September, 1964.

PEIRSON M. HALL
United States District Judge

APPENDIX E.

Judgment of Dismissal.

United States District Court, Southern District of California, Central Division.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, vs. C.W. Murchison, et al., Defendants. No. 63-237-PH

The motion of defendants, THE MURMANILL CORPORATION and DIVERSA, INC., to Dismiss the Amended Complaint herein, filed December 4, 1963, having come on regularly for hearing on January 6, 1964, before the undersigned United States District Judge, plaintiffs then appearing by Hy Schwartz Esq., their attorney of record, and moving defendants then appearing by Messrs. Ely, Kadison & Quinn by Stuart L. Kadison, Esq. and James R. Dunn, Esq. and oral argument having been had and the matter having been submitted, and the Court having considered the Motion, the Memorandum of Points and Authorities in Opposition Thereto, the Closing Memorandum filed in behalf of the moving defendants, and all of the record and files herein and the Court having heretofore on November 8, 1963, made an order upon the *ex parte* application of the plaintiff which, for the reasons stated in its Memorandum and Order dated and filed September 30, 1964, the Court on that date vacated, and the Court having filed its Memorandum and Order of September 30, 1964, and the Court being fully advised, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that

1. The above entitled cause should be, and hereby is, dismissed as to all defendants; and

2. Defendants shall have and recover from the plaintiffs their costs of suit taxed in the sum of $.....

3. The Clerk is directed to enter this Judgment.

Dated this 8th day of October, 1964.

.....

United States District Judge

Approved as to form:
/s/ Hy Schwartz
Attorney for plaintiffs

APPENDIX F.

Order Denying Plaintiff's Motion to Vacate Judgment and Order of Dismissal for Want of Jurisdiction and to Amend the Complaint to Clarify the Jurisdictional Issue (Rule 59(e) F.R.C.P.).

United States District Court, Southern District of California, Central Division.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, vs. C. W. Murchison, et al., Defendants. No. 63-237-PH

The Motion of the plaintiffs, STEPHAN RIESS and THELMA McKINNEY RIESS, to vacate judgment and order of dismissal for want of jurisdiction and to amend the complaint to clarify the jurisdictional issue (Rule 59(e) F.R.C.P.), served on October 13, 1964, having come on regularly for hearing on October 26, 1964, before the undersigned United States District Judge, plaintiffs then appearing by HY SCHWARTZ, Esq., their attorney of record, and the responding defendants then appearing by MESSRS. ELY, KADISON & QUINN, by STUART L. KADISON, Esq., and James R. DUNN, Esq., the Court having read the records and files for the above entitled cause, the various Notices of Motion, the Memoranda of Points and Authorities and Declarations filed both in support and in opposition to the Motion, and the Court having found that the allegations of the Amended Complaint do not meet the requirements for Federal jurisdiction and further that the Declarations filed by plaintiff are insufficient to remedy the jurisdictional deficiency, and the Court being fully advised, and good cause appearing therefor,

IT IS ORDERED AS FOLLOWS:

1. The Motion by plaintiffs to vacate judgment and order of dismissal for want of jurisdiction and to amend the complaint to clarify the jurisdictional issue (Rule 59(e) F.R.C.P.) is hereby denied.

The clerk is directed to enter this order.

Dated: November 5, 1964.

/s/ Peirson M. Hall
Peirson M. Hall, United States
District Judge

APPROVED AS TO FORM:
Hy Schwartz, Esquire

APPENDIX G.

United States Court of Appeals for the Ninth Circuit

Stephan Riess and Thelma McKinney Riess, Appellants, vs. C. W. Murchison, Et Al, Appellees No. 19790

Appeal from the United States District Court, Southern District of California, Central Division

Before: Madden, Judge, Court of Claims, Jertberg and Duniway, Circuit Judges

Upon consideration thereof, and good cause therefor appearing, IT IS ORDERED that the judgment of dismissal of the District Court is hereby affirmed, and the order of the District Court denying motion to vacate judgment and order of dismissal for want of jurisdiction is hereby affirmed.

/s/ J. Warren Madden
Judge, U.S. Court of Claims
/s/ Gilbert H. Jertberg
/s/ Ben C. Duniway
United States Circuit Judges

APPENDIX H.

Office of the Clerk
U. S. Court of Appeals
P.O. Box 547
San Francisco 1, Calif.

Oct. 14, 1965

Messrs. Pollock & Deutz
Attorneys at Law
612 South Flower St.
Los Angeles, Calif.

Dear Sir:

The Petition for a Rehearing Riess etc. v. C. W. Murchison heretofore filed in case No. 19790 et al. was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

Frank H. Schmid,
Clerk.

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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

STEPHAN RIESS and THELMA McKINNEY RIESS,
Petitioners,

vs.

C. W. MURCHISON, JOHN MURCHISON, GERALD C. MANN, RUSSELL ALLEN, MARTHA COLON, MURMANILL CORPORATION, a Texas corporation, DIVERSA, INC., a Delaware corporation, KADOTA DEVELOPMENT COMPANY, INC., a Delaware corporation, DIXIE PIPE LINE COMPANY, a Delaware corporation, changed to SIMI VALLEY DEVELOPMENT COMPANY, a corporation, DIVERSA-CAL PROPERTIES, INC., a Nevada corporation, DIVERSA-CAL DEVELOPMENT COMPANY, a Nevada corporation, PACIFIC WESTERN PROPERTIES, INC., a Nevada corporation,
Respondents.

Brief for Respondents in Opposition to Petition for a Writ of Certiorari.

Opinions Below.

There was no written opinion of the United States Court of Appeals for the Ninth Circuit other than the *per curiam* Order affirming the judgment of dismissal of the District Court and denying the Motion to Vacate Judgment and Order of Dismissal. This Order and all other orders and written memoranda of the District Court are accurately reproduced in the appendices to the Petition.

Jurisdiction.

Jurisdiction of the United States Supreme Court to review the order of the Court of Appeals is conferred by 28 U.S.C. §1254(1).

Question Presented.

On many occasions, both in open Court and through written memoranda, petitioners were advised of the requirements of pleading diversity jurisdiction under 28 U.S.C. §1331(a)(1) and §1332(c). The Complaint was never conformed to these requirements.

The question presented is whether the District Court abused its discretion in dismissing the Amended Complaint, and whether the Court of Appeals committed error in its affirmance thereof and denial of the motion to vacate.

Statement of Facts.*

On March 1, 1963, petitioners filed suit against five individual and seven corporate defendants** (respondents herein).

On April 3, 1963, motions were filed by respondents under Rules 12(b)(1), 12(b)(2) and 12(b)(6) F.R.C.P. [C. T. pp. 41, 51] and on May 13, 1963, came on for hearing, the Court quashing service on the individual respondents under Rule 4(f) F.R.C.P. [C.

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*Page references to the Reporter's Transcript of Proceedings and to the Clerk's Transcript of Record on Appeal are preceded by "R. T." and "C. T." respectively.

**Purported service of process was effected on all except Kadota Development Company, Inc. and the Doe defendants.

T. p. 136]. Determination of the remaining portions of the motions was deferred. In the interim, on July 3, 1963, additional motions were filed under Rule 12(b)-(2) F.R.C.P. [C. T. p. 138].

On April 12, 1963, all pending motions were heard and the Court filed its Memorandum and Order on October 10, 1963. (Petition, App. B). As a part of this Order petitioners were directed to file a more definite statement as requested in the original motions [C. T. pp. 41, 51].

In response to the Order of October 10, 1963, directing a more definite statement, but not in conformity therewith, petitioners filed an amended complaint [C. T. p. 183].

After service on respondents Murmanill Corporation and Diversa, Inc., pursuant to *ex parte* order [C. T. p. 218; Petition, App. C]; and after renewed motions under Rules 12(b)(2) and 12(b)(1) F.R.C.P. [C. T. pp. 219, 224]; all pending motions came on for hearing on September 30, 1964, and the Court dismissed the Complaint by written Order and memorandum of the same date [C. T. p. 274; Petition, App. D]. The basis of dismissal was lack of federal diversity jurisdiction due to (1) failure to allege the principal place of business of the corporate defendants as required under 28 U.S.C. §1332(c), and (2) failure to plead "citizenship" in accordance with 28 U.S.C. §1332 as to the individual defendants. The Court found it unnecessary to consider the other grounds urged for dismissal.

Final judgment of dismissal was entered October 9, 1964 [C. T. p. 278; Petition, App. E].

October 12, 1964, petitioners moved the District Court to vacate the Judgment and Order of dismissal under Rule 59(e) F.R.C.P. [C. T. pp. 281, 295]. This motion was denied by order dated November 5, 1964 [C. T. p. 319; Petition, App. F].

The Court of Appeals for the Ninth Circuit affirmed the judgment of dismissal and denial of the motion to vacate [Petition, App. G]. On October 14, 1965, a petition for rehearing was denied (Petition, App. H).

That neither the original nor the amended Complaint contained the requisite allegations to establish federal jurisdiction has been argued by respondents; found to be true by the Court; and, indeed, admitted by petitioners in open Court [R. T. p. 51] and in their Petition to this Court [Petition, pp. 5, 7].

ARGUMENT.

I.

There Was Not an Abuse of Discretion by the District Court in Dismissing the Amended Complaint.

Petitioners have included in their Petition a section entitled "The Gist of the Problem," authority for which we do not find either in 28 U.S.C. §1254 or Rule 40 of the Rules of the Supreme Court. For purposes of reply we consider this section a part of the "argument" as provided for under Rule 40(g).

As preface to attacking the issues one must focus on the reasons for the dismissal of the Amended Complaint. The District Court found that there was a total failure on the part of petitioners to *plead* the principal place of business of any of the corporate defendants or the citizenship of the individual defendants. For a court to decide such a question it has but one place to look—the complaint.

Haley v. Childers, 314 F. 2d 610, 613 (8 Cir. 1963);

Patton v. Baltimore & O. R. Co., 197 F. 2d 732, 743 (3 Cir. 1952);

Peoples Bank v. Rue, 210 F. Supp. 952, 953 (D.C. Iowa 1962).

The many words offered the court in argument which relate to affidavits and extrinsic evidence are totally irrelevant as the issue was not one of *testing allegations in a Complaint; Shahmoon Industries, Inc. v. Imperato,* 338 F. 2d 449 (3 Cir. 1964), or treating a Rule 12(b)(6) motion as one for summary judgment; *Mantin v. Broadcast Music, Inc.,* 248 F. 2d 530 (9 Cir.

1957), but rather, of determining whether certain facts had been *alleged* at all. The issue resulting in the dismissal was one of *pleading—of allegation; not of sufficiency or proof of allegations* which had been pleaded and appeared on the face of the Complaint. Let us turn now to the Petition.

There are no alleged conflicts in the Circuits nor is it suggested there is an important question of federal law at stake. The basis of the Petition lies in Rule 38(5)(b) (Rules of the Supreme Court) providing that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." In effect, petitioners are saying that the Amended Complaint was insufficient because their lawyer was inept and further that the trial Court was unfair and abused its discretion in not allowing further amendment. Nowhere is it suggested that the amendment was not made because in the good conscience of trial counsel it could not be made. Whether this latter surmise be true or not is unimportant. The fact remains that the critical allegations were absent — absent after repeated admonition by counsel for respondents and the Court.

As early as April 3, 1963, over six months before the Amended Complaint was filed, respondents cited the law of total diversity at length in their memorandum of points and authorities which was submitted to the Court *and counsel* [C. T. pp. 75, 88; pp. 10-11 of memo].

> "So far as the corporate defendants are concerned, again plaintiffs are obliged affirmatively to

show diverse citizenship, and this cannot be done merely by an allegation as to the state of incorporation. Title 28, section 1332(c) provides, in effect, that a corporation has dual citizenship, that is, it is to be deemed a corporation of the state of its incorporation and of the state where it has its principal place of business. It is clear that the complaint is defective in that it does not contain allegations with respect to the principal place of business of the corporate defendants."

At the hearing of August 12, 1963, after the Court allowed petitioners to cure a similar jurisdictional defect by interlining the word "citizen" in place of "resident" as it applied to the petitioners, counsel for respondents emphasized the corporate dual citizenship and total diversity requirement in open Court: [C. T. p. 18]

"Mr. Kadison: But the more serious defect, if it please the court, and the one I don't believe can be cured by interlineation is the failure to comply with what I call Section 1334 of Title 28, which is really 1332(c) of Title 28—every time I read the Code section I think of something important — which provides, in effect, that a corporation has dual citizenship, and not only must it be alleged that it is a corporation in another jurisdiction but also it must be made clear by allegation that the corporation has no principal place of business in this jurisdiction."

The Court also told counsel there must be total diversity [C. T. pp. 19-20]:

"The Court: On the matter of diversity, Mr. Schwartz, THERE MUST BE COMPLETE DIVERSITY.

> In other words, part of the defendants can be residents of Texas and part of them of California, but if any single one is a resident of California your whole action fails in the federal court for lack of jurisdiction, and apparently from the face of your complaint you have alleged here that Diversa, Inc., Kadota Development Company, Inc., Dixie Pipeline Company, Simi Valley Development Company were and now are corporations existing under the laws of Delaware, and there are some here of California." (Emphasis added.)

When the Amended Complaint was filed after these repeated discussions and instructions on diversity jurisdiction—and the required allegations were still absent—respondents could only conclude that they were not made because they could not be made. The court came to this same conclusion [C. T. p. 54].

Further enlightenment on the diversity issue is found in the comments of counsel for respondents at the hearing of January 6, 1964 [C. T. p. 28]. Petitioner could have amended his complaint at any time during the proceeding since respondents never filed a responsive pleading — motions not being considered as such for purposes of amendment. On April 12, 1963, the Court so instructed petitioner [C. T. p. 16]:

> "The Court: But you haven't made a motion to amend. You can amend. Since the defendants have not answered you can amend at any time."

In this statement one finds a most generous attitude being taken by the Court. The Court took into consideration the possibility of allowing a Second Amended Complaint as late as the time of dismissal, over a year

after suit was filed, but declined to do so for the following reasons (Petition, App. D):

> "The Court has taken into consideration the matter of dismissing the Complaint and allowing plaintiffs to again amend. But, as heretofore pointed out, this is the second chance that counsel for plaintiffs, an experienced and able lawyer, has had to make his complaint conform to the requirements for diversity, and he has failed to do so. Under these circumstances, the Court can only conclude that he cannot do so, and feels justified in dismissing the action. See: *Gunther v. San Diego & Arizona Eastern Ry. Co.* (9 Cir. Sept. 4, 1964) No. 18,724."

The facts do not support the alleged abuse of discretion in light of the opportunities afforded. The clarity with which the pertinent law was expounded leads not to the conclusion that counsel was inept, but rather that he was laboring under the handicap of factual realities which prevented him from changing his pleading. Even were it otherwise, surely respondents ought not to be dragged through months of time consuming and expensive legal meanderings only to be told to begin anew because of oversights on the part of opposing counsel. Prejudice is a two edged sword and to require respondents to backtrack at this point would be unconscionable and unjust.

The learned judge of the District Court and the able judges of the Court of Appeals had ample opportunity to review the record. With their conclusions we agree.

II.

Petitioners' Authorities Are Inappropriate and Inadequate to Support an Exercise of the Writ of Certiorari.

To begin with it is highly significant to note that petitioners have not cited a single case where the Supreme Court of the United States has granted relief similar to that requested in this Petition. In no case cited is an alleged "ineptness of counsel" the basis for reversal or remand where there is a claimed abuse of discretion.

Petitioners rely heavily on the doctrine of *Foman v. Davis,* 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) and without the benefit of factual or procedural backdrop, cite at length out of context. The holding of the *Foman* case, *supra,* is not applicable here nor is the language of dicta inconsistent with the rulings of the District Court and the Court of Appeals.

Foman involved the narrow reading by the Court of Appeals of a notice of appeal after denial of a motion to vacate under Rule 59(e) F.R.C.P. The 59(e) motion by its nature suspends the running of time within which an appeal may be perfected and as a result the original notice of appeal was ineffective because premature. The second notice failed to specifically state that appeal was from both the original order of dismissal as well as the denial of the 59(e) motion. Considering the second notice only as an appeal from the denial of the motion, the Court of Appeals considered itself precluded from finding an abuse of discretion by the trial Court in refusing to allow an amendment, since it held there was nothing in the record to show the circumstances which were before the

District Court. Mr. Justice Goldberg held for the Court that it was error to so narrowly construe the second notice and thus restrict the record on review.

In the principal case there was no question about the effectiveness of the notice of appeal. The Court of Appeals here had both the record of the dismissal proceedings *and* the 59(e) proceedings and concluded on the basis of the *entire* record (contrary to the *Foman* case, *supra,* where the Court declined to look at the dismissal record) that there had been no abuse of discretion. The *Foman* holding does not apply.

By way of dictum the Court stated that leave to amend should be "freely given" in the absence of any apparent or declared reasons. Petitioners have seized upon "undue delay", "bad faith" and "dilatory motive"—three of the "declared reasons" suggested by the Court—and proclaimed their innocence of these vices in order to bolster their argument that leave should have been granted here. Reading on in the opinion, however, one finds that "repeated failure to cure deficiencies by amendments previously allowed (and), undue prejudice to the opposing party by virtue of allowance of the amendment, . . . etc." are equally persuasive reasons for denial of amendment in the mind of the Court. We believe these latter reasons are applicable here and are more than adequately supported in the record. The dictum of the *Foman, supra,* case is convincing support for respondents.

In further discussion of the *Foman* case, *supra,* petitioners contend that it was an abuse of discretion not to take into consideration facts "outside the complaint" [Petition, p. 13] when in fact the law is clear that jurisdictional allegations must be shown affirma-

tively. Rule 8(a)(1), F.R.C.P.; *Stewart v. United States,* 109 F. 2d 517, 520 (7 Cir. 1952); *Patton v. Baltimore & O. R. Co.,* 197 F. 2d 732, 743 (3 Cir. 1952) and moreover, that jurisdictional facts must always appear on the face of the Complaint. *Haley v. Childers, etc., supra.* The partial quote from the transcript at page 14 of the Petition merely exemplifies the fact that the issue before the Court was one of allegation or pleading and not one of fact relative to the principal place of business or service of process. Inadequacy of the pleading requirement obviated the necessity to rule on the latter two grounds which were factual in nature.

Even if the Court had relied upon extrinsic evidence in the affidavits to *substitute* allegations in the Complaint the pleading would have remained defective. Diversity of citizenship must be complete. *Treinise v. Sunshine Mining Co.,* 308 U.S. 66, 71-72 (1939); *Strawbridge v. Curtiss,* 7 U.S. (3 Cranch), 267 (1806). Since a corporation has dual citizenship for jurisdictional purposes, 28 U.S.C. Sec. 1332(c); *Stenhouse v. Jacobsen,* 193 F. Supp. 694, 695-96 (N.D. Cal. 1961); *Brandt v. Bay City Super Market,* 182 F. Supp. 937, 939 (N.D. Cal. 1960) the pleading must allege the state of incorporation and the principal place of business of each and every corporate defendant. There were six defendants in the case at bar. The Complaint shows the principal place of business of none; the affidavits show the principal place of business of but three. Total diversity is absent in any event.

The remaining cases cited by petitioners are all in the Courts of Appeals and contain language similar to the dicta of the *Foman* case, *supra,* or rely directly on

that opinion. A good example is the Ninth Circuit case of *Breier v. Northern California Bowling Proprietors Ass'n,* 316 F. 2d 787 (9 Cir. 1963) which is not a case dealing with alleged ineptness of counsel. The opinion lays great stress on the *Foman* dictum, discussed at length above. Furthermore, the *Breier* Court concluded the question of amendment had not been directed to the Court's discretion as the amendment should have been granted as a matter of right—a situation contrary to our case and thus distinguishable.

In other cases cited the Court had given relief from mere technicalities at the intermediate Court of Appeals level. This is a useful and proper function of the Circuits both in relieving litigants of undue prejudice and relieving the Supreme Court from the burdens of reviewing cases of limited scope and impact beyond the particular parties involved. We do not quarrel with this role of the Circuit Courts. We are confident that such relief would have been granted by our Ninth Circuit Court of Appeals in this case had the alleged evils been present. In fact, of course, they were not and the Writ of Certiorari should be denied.

That the Court of Appeals was not in error in denying the motion to vacate under Rule 5(e) F.R.C.P. is clear. Only for an abuse of discretion by the trial Court will such an order be overturned. *Walker v. Bank of America, etc.,* 268 F. 2d 16, 25 (9 Cir. 1959) petition for rehearing denied 361 U.S. 941 (1960). The record discloses that there was no abuse of discretion.

Petitioner suggests that the swift affirmance by the Court of Appeals without opinion indicates that the record was so obtruse and confusing that the Court

never recognized the real problem sufficiently to enable it to pass on the merits.

We have greater confidence in the Ninth Circuit. It seems more plausible to respondents that the record was so patent in its mandate to the Court of Appeals that no written opinion was necessary.

Conclusion.

It is respectfully submitted that petitioners were afforded every opportunity to plead a cause in the Federal Courts. That they did not do so successfully is testimony that they could not do so in light of the true facts. The District Court did not abuse its discretion in dismissing the Complaint nor did the Court of Appeals sanction or commit new error by affirming the dismissal and denying the motion to vacate. Amendment of the complaint at this stage would cause undue prejudice to respondents.

The Writ should be denied.

Respectfully submitted,

JOHN J. QUINN, JR.,
Attorney for Respondents.